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Madam:

In response to the Examiner's Answer mailed September 14, 2009, Applicants request the appeal be maintained and supply the following arguments in reply under 37 C.F.R. § 41.41(a) (1).

Applicants acknowledge the Examiner's status of the claims in the Answer is correct. Claims 1-20 are pending. Claims 1-20 currently stand rejected. Claims 1 and 14 are independent claims. The claims are rejected as follows:

1. Claims 1-4, 7, 10-11, 14-17, and 20 stand rejected under 35 U.S.C. § 102(b) as being anticipated by US Pat 5,778,820 to Van der Lely et al. (“Van der Lely”).
2. Claims 5-6 and 18-19 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Van der Lely in view of US Pat 5,769,023 to Van der Lely et al. (“Van der Lely ‘023”).
3. Claims 8 and 9 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Van der Lely in view of US Pat 6,263,832 to Van der Berg (“Van der Berg”).
4. Claims 12 and 13 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Van der Lely in view of US Pat 6,543,381 to Birk et al. (“Birk”).

Claims 1-20 are being appealed.

II. GROUND OF REJECTION TO BE REVIEWED ON APPEAL:

Appellant seeks the Board's review of the following rejections:

1. The rejection to claims 1-4, 7, 10-11, 14-17, and 20 under 35 U.S.C. § 102(b) as being anticipated by US Pat 5,778,820 to Van der Lely et al. (“Van der Lely”).
2. The rejection to claims 5-6, 8, 9, 12, 13, and 18-19 under 35 U.S.C. § 103(a) as being unpatentable over Van der Lely in view of

US Pat 5,769,023 to Van der Lely et al. (“Van der Lely ‘023”), Van der Lely in view of US Pat 6,263,832 to Van der Berg (“Van der Berg”), or Van der Lely in view of US Pat 6,543,381 to Birk et al. (“Birk”).

Claims 1-20 rise and fall together.

III. ARGUMENT

A. “Approximately at the same time” is not necessarily “before.”

In response to the Applicants’ argument that the limitation of claims 1 and 14, “terminating said feeding of said milking animal at a non-final stage of said milking in order to secure that said milking animal has terminated to consume the feed when said milking is finished” is missing from Van der Lely, the Examiner answers that the abstract of Van der Lely meets this element. Particularly, the Examiner answers that the statement, “fodder is distributed at least substantially uniformly over the actual feeding period so dispensing of fodder and the feeding period ends approximately at the same time that the milking operation ends,” can meet the quoted claim element, because “approximately at the same time” includes “before.” See Answer mailed September 14, 2009 (“Answer”), pp. 7-8. The Examiner further answers that the claim can be interpreted to include simultaneously terminating feed dispensation and milking. See Answer, p. 9.

Leaving aside the issue that “dispensing of fodder” does include feed consumption for the moment (this point is addressed in the section below), Applicants respectfully reply that “the feeding period ends approximately at the same time that the milking operation ends” does not necessarily meet the recited “has terminated to consume the feed when said milking is finished.” Initially, claims 1 and 14 grammatically require that feed consumption stops before milking finishes. The claim phrase “said milking animal **has terminated** to consume the feed **when said milking is finished**” uses the present perfect tense, which expresses an action has been completed with respect to the present or other identified time. Here, the action termination of consumption is modified by the present perfect tense with respect to when milking is finished. This requires that the milking animal be in a state of consumption termination when milking finishes; that is, the animal stopped eating before the milking finished. As such, the Examiner’s attempt to construe the claim to read on simultaneous milking and consumption termination is not grammatically correct or within any reasonable interpretation of the claim.

“Approximately at the same time” can fairly mean substantially contemporaneous, slightly after, or slightly before; Van der Lely does not further clarify this timeframe. As discussed above, claims 1 and 14 necessarily require consumption to terminate before milking terminates. If Van der Lely necessarily required feed dispensation to terminate feeding before milking terminates, Van der Lely would have said “before” instead of “approximately at

the same time.”¹ That an action may occur in the prior art is not sufficient to establish the inherency of that result or characteristic under § 102. See In re Rijckaert, 9 F.3d 1531, 1534 (Fed. Cir. 1993); MPEP § 2112. Because Van der Lely does not necessarily require “terminating said feeding of said milking animal at a non-final stage of said milking in order to secure that said milking animal has terminated to consume the feed when said milking is finished,” Van der Lely cannot anticipate claims 1 or 14.

B. Feeding and consuming feed mean different things in the claims.

In response to Applicants’ argument that “feed” and “consume” as used in the claims are distinct actions with distinct timeframes and meanings, the Examiner answers only that the ending of the feeding period of van der Lely is equivalent to the recited “terminated to consume the feed.” See Answer, p. 8. **The Examiner does not explain this equivalence between van der Lely and the claims or answer why the different words “feed” and “consume” in the claims are interpreted to mean the same thing or ignored.** Thus, Applicants simply reiterate the argument from the Appeal Brief that the use of different terms for each action and different times for each action in the claims reasonably indicates that the feeding, consumption, and milking are distinct.

¹ Although not rejected as such, claims 1 and 14 would additionally not be obvious over Van der Lely because of these unaccounted-for differences between the claims and the prior art. A new obviousness-type rejection is further not proper in light of the argument in the Appeal Brief, page 11 that Van der Lely uses the “approximately” language to reflect that feeding beneficially extends beyond milking in several of its embodiments. See also, Van der Lely, Col. 5, ll. 55-67.

See Appeal Brief, pp. 9-10. Accepting this unanswered argument, van der Lely only fairly describes feed dispensation in its phrase “the feeding period ends approximately at the same time that the milking operation ends.” By this, van der Lely is wholly missing the timing requirement that “said milking animal has terminated to consume the feed when said milking is finished,” as van der Lely discusses eating/consumption only in other, unrelated contexts. *See* Van der Lely, Col. 3, ll. 51-54; Col. 6, ll. 1-7. Because Van der Lely does not disclose every element of the claims, Van der Lely cannot anticipate claims 1 or 14.

IV. CONCLUSION

In sum, van der Lely at least fails to necessarily disclose each and every element of the claims, including feed dispensation termination before milking termination, and, most likely entirely fails to describe feed consumption termination before milking termination. Applicants respectfully maintain their request that the Board overturn the rejections under § 102(b) to claims 1-4, 7, 10-11, 14-17, and 20 based on the misinterpretation of the claims and misapplication of van der Lely. Applicants concomitantly maintain their request that the Board overturn the rejections under § 103(a) to the dependent claims, which depend from nonobvious base claims.

The Commissioner is authorized in this, concurrent, and future replies, to charge payment or credit any overpayment to Deposit Account No. 08-0750 for any additional fees required under 37 C.F.R. § 1.16 or under 37 C.F.R. § 1.17; particularly, extension of time fees.

Respectfully submitted,
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